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IN THE
COURT OF APPEALS OF INDIANA

ROBERT WARNER,	)	
	)	
Appellant-,	)	
	)	
vs.	)	No. 49A02-0605-CR-416
	)	
STATE OF INDIANA,	)	
	)	
Appellee-.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jane Magnus Stinson
Cause No. 49G06-0406-MR-117149

June 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Robert Warner pleaded guilty to Criminal Confinement,[1] as a class B felony, and Criminal Recklessness,[2] as a class C felony. The trial court sentenced him to consecutive terms of ten years for confinement and eight years for criminal recklessness, for an aggregate sentence of eighteen years in prison. In this belated appeal, Warner presents the following consolidated and restated issues for review:

1. Do the dual convictions violate double jeopardy?

2. Did the trial court improperly resentence Warner after the sentencing hearing when it issued its written sentencing order?

3. Did the trial court properly sentence Warner?

We affirm.

After being married for over twenty years, Warner and his wife, Pam Warner, became estranged because Warner developed a drug problem. The couple separated and then reconciled various times over a period of about two years. Pam finally moved out and then filed for divorce in February 2004. She also began seeing another man.

Around June 2004, Warner learned of Pam's other relationship and redoubled his efforts to reconcile with her. In mid-June, Pam agreed to speak with Warner about reconciling. On June 25, Pam and Warner spent the day together and went to a baby shower for their first grandchild. They both drank alcohol at the gathering and then went back to Pam's home and had sex. Thereafter, around midnight, Warner indicated that he wanted to talk with Pam, apparently about reconciling and particularly about her breaking things off with the other man. When Pam insisted that she did not want to talk, Warner went into the

1 Ind. Code Ann. § 35-42-3-3 (West, PREMISE through 2006 2nd Regular Sess.).

kitchen and obtained a steak knife.

Warner apparently threatened to kill himself, and Pam grabbed the knife. This made him angry, so Warner proceeded to straddle Pam and pin her on the couch with his knees. A struggle ensued and Pam was ultimately stabbed and/or lacerated twenty-four times with the knife. A stab wound to her chest resulted in the collapse of her right lung. At some point during the assault, the tip of the knife broke off into Pam's ear and the handle separated from the blade.

Indianapolis Police Department Officer Robert Robinson responded to the 911 call from Pam's neighbor, who had been warned the previous week by Pam to call the police if he ever heard anything "odd or strange" from her side of the duplex. *Transcript* at 35. When Officer Robinson arrived, Pam attempted to reach the door to let him in, but Warner grabbed her with his hands and slammed her back onto the couch. Warner then broke out a window and attempted to escape out the back of the house. Officers, however, were eventually able to apprehend him.

On June 29, 2004, the State charged Warner with attempted murder, a class A felony, and resisting law enforcement, a class A misdemeanor. At the conclusion of a two-day jury trial in June 2005, the jury was unable to reach a verdict and the trial court declared a mistrial.

Thereafter, the parties entered into a plea agreement, which the trial court accepted on October 13, 2005. That same day, the State filed two additional counts against Warner for criminal confinement and criminal recklessness. Pursuant to the plea agreement, Warner

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2 I.C. § 35-42-2-2 (West, PREMISE through 2006 2nd Regular Sess.).

pleaded guilty to these two counts, and the State agreed to dismiss the attempted murder and resisting law enforcement charges. The agreement further provided for an aggregate executed sentence of not less than ten years. At the conclusion of the sentencing hearing, the trial court sentenced Warner to consecutive terms of ten years for the confinement conviction and eight years for the criminal recklessness conviction, for a total of eighteen years in prison. Warner now appeals. Additional facts will be provided below as necessary.

1.

Warner raises a double jeopardy claim under article 1, section 14 of the Indiana Constitution. He argues that his convictions for both crimes were unconstitutional because "[t]he State used 'wrestling' to establish both the charge of confinement and the charge of criminal recklessness." *Appellant's Brief* at 11. Therefore, he argues we should vacate his conviction and sentence for confinement.

Our Supreme Court has made clear that a defendant who pleads guilty to achieve a favorable outcome gives up a plethora of substantive claims and procedural rights, such as challenges to convictions that would otherwise constitute double jeopardy. *See Debro v. State*, 821 N.E.2d 367 (Ind. 2005). As Warner clearly received a significant benefit from the plea agreement (most notably, dismissal of the class A felony attempted murder charge), he cannot now be heard to complain that his convictions violate double jeopardy.[3]

2.

3 Indeed, Warner expressly acknowledged at the plea hearing that by pleading guilty he was "giving up the right to claim any defenses to the charges to which [he was] pleading guilty, including but not limited to any double jeopardy claim that may exist." *Transcript* at 365.

Warner also asserts the trial court violated his constitutional rights to due process and fundamental fairness when the court "re-sentenced him after his sentencing hearing, out of court, in writing and without counsel." *Appellant's Brief* at 13. In this regard, Warner challenges the written sentencing statement issued by the trial court the day after the court orally pronounced his sentence at the sentencing hearing. While he acknowledges that the written statement imposed the same eighteen-year sentence, Warner argues the written statement "found mitigating circumstances not found in open court [and] re-evaluated mitigating and aggravating circumstances". *Id*. Therefore, Warner claims he was "re-sentenced without a hearing [and] without counsel." *Id*.

At the conclusion of the sentencing hearing, the trial court provided a detailed oral sentencing statement, in which the court addressed a number of aggravating and mitigating factors. Near the end of its lengthy statement, the court indicated, "so I articulated the aggravators in a more free flowing way than perhaps the appellate courts will like but it's 4:30 and we've been here for a long time." *Transcript* at 465. The following day, the court issued its written sentencing statement, explaining at the outset:

> Indiana Code § 35-38-1-3 requires that if the trial court finds aggravating or mitigating circumstances, its record must include "a statement of the court's reasons for selecting the sentence that it imposes." While the transcript of the sentencing hearing can serve as compliance with the foregoing provisions, the Court chooses to *augment* its spoken sentencing statement with this written statement.

Appendix at 153 (emphasis supplied). The court then proceeded with a detailed discussion of its findings regarding the proffered mitigating and aggravating factors.

Warner's assertion that he was resentenced without a hearing and without counsel is entirely without merit. Rather, the written sentencing statement was simply the trial court's

effort to more fully explain the reasons for the eighteen-year sentence it had imposed at the conclusion of the sentencing hearing. This court, in fact, has encouraged the issuance of just such a detailed written sentencing statement. *See Mundt v. State*, 612 N.E.2d 566, 568 (Ind. Ct. App. 1993) ("[w]hile better practice would be for the trial court to set out a written statement of its reasons in its sentencing order, it is sufficient, in non-death penalty cases, if the trial court's reasons for enhancement are clear from a review of the sentencing transcript"). Further, on appeal, we regularly "examine both the written and oral sentencing statements to discern the findings of the trial court." *McElroy v. State*, No. 49S02-0605-CR-174, slip op. at 5 (May 2, 2007).

In *McElroy*, our Supreme Court was recently faced with a situation in which the oral and written sentencing statements conflicted to a certain degree. The Court explained:

> Rather than presuming the superior accuracy of the oral statement, we examine it alongside the written sentencing statement to assess the conclusions of the trial court. This Court has the option of crediting the statement that accurately pronounces the sentence or remanding for resentencing.

Id. The Court then examined both sentencing statements with respect to McElroy's challenges to the aggravating factors found by the trial court.

In the instant case, Warner was sentenced in open court, with his counsel present, to an aggregate term of eighteen years in prison, and the written statement merely offered a fuller explanation of the sentence imposed. While minor inconsistencies exist between the oral and written sentencing statements, the subsequent written statement did not amount to a resentencing as urged by Warner.

3.

Finally, Warner makes various claims that he was improperly sentenced. We will

address each in turn.

With respect to his claim based on *Blakely v. Washington*, 542 U.S. 296 (2004), we observe that Warner expressly waived his *Blakely* rights in the plea agreement. Paragraph 8 of the plea agreement provides:

> The defendant acknowledges that the defendant has a right, pursuant to the Sixth Amendment to the United States Constitution and Article I, Section 13 of the Indiana Constitution, to have a jury determine, by proof beyond a reasonable doubt, the existence of any fact or aggravating circumstance that would allow the Court to impose a sentence in excess of the statutory presumptive sentence and to have the State of Indiana provide written notification to the defendant of any such fact or aggravating circumstance. The defendant hereby WAIVES such rights and requests that the Judge of this Court make the determination of the existence of any aggravating and/or mitigating circumstances and impose sentence, after considering the presentence investigation report and any appropriate evidence and argument presented at the sentencing hearing.

Appendix at 130. Thus, Warner consented to judicial factfinding and may not now appeal on *Blakely* grounds. *See Huffman v. State*, 825 N.E.2d 1274 (Ind. Ct. App. 2005), *trans. denied*.

Warner next, in passing, cites *Beno v. State*, 581 N.E.2d 922 (Ind. 1991) for the proposition that "a trial judge should [not] be allowed to use the sentencing process as a method of sending a personal philosophical or political message." *Id.* at 924 (trial court improperly imposed consecutive sentences to make an example of Beno to other drug dealers). He then baldly asserts the trial court improperly sentenced him by "pursuing her personal agenda and goals toward correcting what she saw as an abusive relationship." *Appellant's Brief* at 20. We fail to see how *Beno* has any application to the current case.

In another brief discussion, Warner asserts the trial court erred in sentencing him to aggravated and consecutive terms. Relying on the interpretation of Ind. Code Ann. § 35-50-2-1.3 (West, PREMISE through 2006 2nd Regular Sess.) from *Robertson v. State*, 860 N.E.2d

621 (Ind. Ct. App. 2007), he argues that the trial court was limited to the advisory sentence on each count when imposing consecutive sentences. Our Supreme Court, however, granted transfer in *Robertson* on April 17, 2007, thereby vacating that opinion. Further, other panels of this court have consistently interpreted the statute contrary to the *Robertson* panel and have concluded that the statute imposes no additional restrictions upon the ability of a trial court to impose consecutive sentences. *See, e.g.*, *Dixson v. State*, 865 N.E.2d 704 (Ind. Ct. App. 2007), *trans. pending*; *Luhrsen v. State*, 864 N.E.2d 452 (Ind. Ct. App. 2007), *trans. pending*; *Barber v. State*, 863 N.E.2d 1199 (Ind. Ct. App. 2007), *trans. pending*; *White v. State*, 849 N.E.2d 735 (Ind. Ct. App. 2006), *trans. denied.* Following the holdings in these cases, we reject Warner's argument that the trial court was limited by I.C. § 35-50-2-1.3 to impose the advisory sentence when it ordered his sentence for criminal recklessness to be served consecutively to his sentence for confinement.

Warner also makes various complaints regarding certain aggravating and mitigating factors. In this regard, he claims the trial court failed to give mitigating weight to his guilty plea, improperly considered the number of wounds inflicted upon Pam to be an aggravating factor, and failed to consider Warner's character.

It is well established that sentencing decisions lie within the trial court's discretion. *Williams v. State*, 861 N.E.2d 714 (Ind. Ct. App. 2007). Those decisions are given great deference on appeal and will be reversed only for an abuse of discretion. *Golden v. State*, 862 N.E.2d 1212 (Ind. Ct. App. 2007), *trans. denied*. Moreover, the broad discretion of the trial court includes the discretion to determine whether to increase the presumptive sentence, to impose consecutive sentences, or both. *Jones v. State*, 807 N.E.2d 58 (Ind. Ct. App.

2004), *trans. denied*.

Turning to the guilty plea, we initially observe that Warner is incorrect when he asserts the trial court failed to credit his guilty plea as a mitigating circumstance. While the court discussed Warner's acceptance of responsibility in general terms at the sentencing hearing, the court's written statement specifically discussed Warner's acceptance of responsibility by pleading guilty, but afforded it only minimal weight.

It is well established that a defendant who pleads guilty deserves to have some mitigating weight extended to the guilty plea in return. *See Cotto v. State*, 829 N.E.2d 520 (Ind. 2005). While a trial court should make some acknowledgment of a guilty plea when sentencing a defendant, the extent to which a guilty plea is mitigating will vary from case to case. *See Hope v. State*, 834 N.E.2d 713 (Ind. Ct. App. 2005). As has been frequently observed, "a plea is not necessarily a significant mitigating factor." *Cotto v. State*, 829 N.E.2d at 525; *see also Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005) ("a guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one"), *trans. denied*. Here, Warner clearly received a substantial benefit in return for his guilty plea, as the class A felony attempted murder charge was dismissed. Therefore, while the guilty plea constituted a mitigating circumstance, as found by the trial court, it was not entitled to great weight.

Warner next argues the trial court abused its discretion in considering the number of wounds sustained by Pam. Specifically, the court found:

> The number of wounds sustained by [Pam] which hospital records showed alternatively to be 24 lacerations or "multiple stab wounds" one of which

> resulted in a collapsed lung. – The parties stipulated as to the contents of the hospital records. The collapsed lung injury that supports the serious bodily injury element of the criminal recklessness charge is not eligible for consideration as it is an element of that crime. However, the other 23 lacerations (including wounds to the other breast, back, head, leg, and defensive wounds to the hands and arms) are properly considered as aggravating. The Court so finds that the extent of [Pam's] additional injuries (in addition to the one injury charged) is significant and greater than the elements necessary to prove the charge. The Court finds this aggravating circumstance and affords it great weight.

Appendix at 155-56. In both the oral and written sentencing statements, the court explained that this aggravating factor was the reason it imposed the maximum sentence of eight years for criminal recklessness.[4]

Warner's challenge to this aggravating circumstance is difficult to decipher and not supported by any citation to authority. Therefore, we find the argument waived. *See* Ind. Appellate Rule 46(A)(8)(a) (requiring argument be supported by coherent reasoning with citations to authority); *see also Cooper v. State*, 854 N.E.2d 831 (Ind. 2006). Waiver notwithstanding, we observe the trial court properly found, in effect, that the nature and circumstances of the crime were particularly heinous. *See Settles v. State*, 791 N.E.2d 812, 814 (Ind. Ct. App. 2003) ("facts evidencing the particular brutality of an attack may be considered as an aggravating circumstance").

Warner next claims the trial court failed to consider his character. This is simply not true. At the sentencing hearing and in the written sentencing statement, the trial court fully addressed the character evidence presented by Warner at the hearing. For example, the court found his years of service to the community as a little league coach, his exemplary military

service, and his steady employment history all to be mitigating circumstances. The court also acknowledged that for a long part of his life Warner had been good family man, though the circumstances had drastically changed in the years leading up to this offense. Thus, we find that the trial court adequately considered Warner's character when sentencing him.

Finally, Warner appears to contend his eighteen-year sentence is inappropriate in light of the nature of the offense and, particularly, his character. He claims he should have received the presumptive, rather than maximum, sentence for criminal recklessness *or* the court should have ordered that maximum sentence to be served concurrently with the ten-year presumptive sentence imposed for criminal confinement.

We have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B); *Corbin v. State*, 840 N.E.2d 424 (Ind. Ct. App. 2006). "We recognize, however, the special expertise of the trial courts in making sentencing decisions; thus, we exercise with great restraint our responsibility to review and revise sentences." *Scott v. State*, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006), *trans. denied*.

As discussed above, the nature of the offense was particularly brutal. Further, while Warner has exhibited positive character traits in the past (aside from a conviction for dealing marijuana in 1993), in the last two or three years he has started down a dangerous criminal path of drugs and violence against his family. Of particular note, his convictions for

4 The court indicated that it imposed consecutive sentences based upon Warner's recent criminal history. This included his 2003 convictions for possession of cocaine and battery of his own son, crimes for which he completed probation only three months before the instant offense.

possession of cocaine and battery of one of his sons in 2003 did not deter his criminal behavior, even after completing probation and programs for substance abuse and anger management. In light of the nature of the offense and Warner's character, we conclude the eighteen-year sentence imposed by the trial court is not inappropriate.

Judgment affirmed.

BAKER, C.J., and CRONE, J., concur.